Supreme Court, U.S.
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No. 95-31

In the Supreme Court of the United States

OCTOBER TERM, 1995

SHANNON RICHEY FAULKNER, PETITIONER

v.

JAMES E. JONES, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a State that provides a rigorous military-style educational program for men can remedy the unconstitutional denial of the same opportunity to women by offering them a different type of single-sex educational program deemed more suited to the average woman.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 51 F.3d 440. The opinion of the district court (Pet. App. 33a-66a) is reported at 858 F. Supp. 552.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1995. The petition for a writ of certiorari was filed on July 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Citadel is a state college for men in Charleston, South Carolina. Petitioner applied for and was accepted to The Citadel's freshman class for the 1993-1994 school year, but The Citadel revoked her acceptance when it learned that she was female. Pet. App. 2a, 36a-37a, 71a-72a. On March 2, 1993, she filed suit, seeking an order admitting her to The Citadel and permanently enjoining its males-only admissions policy as a violation of the Equal Protection Clause of the Fourteenth Amendment. On May 28, 1993, petitioner filed a motion for class certification, which remains pending. In June, 1993, the United States intervened as a plaintiff pursuant to 42 U.S.C. 2000c-6. Pet. App. 34a.

2. Following a bench trial on the merits, and in light of the court of appeals' decision in *United States* v. *Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), cert. denied, 113 S. Ct. 2431 (1993), the district court on July 22, 1994, held that The Citadel's males-only admissions policy violated the Equal Protection Clause. Pet. App. 33a-66a.[1] In order to ensure that the violation of petitioner's rights was remedied notwithstanding the additional time that might be required to implement a remedy for other women, the court ordered petitioner's immediate admission to The Citadel Corps of Cadets. *Id.* at 62a-

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[1] On August 17, 1993, the district court had granted petitioner's motion for a preliminary injunction permitting her to attend The Citadel as a day student, Pet. App. 69a, and the court of appeals affirmed that order on November 17, 1993, *id.* at 70a-100a. She continued to be excluded, however, from the Corps of Cadets, the military-style co-curricular component that is the central feature of The Citadel's educational program.

63a. Insofar as the rights of other women were concerned, respondents[2] were given until the start of the 1995-1996 school year to formulate and implement a remedial plan conforming with the Equal Protection Clause. *Id.* at 65a.

3. On August 12, 1994, the court of appeals stayed petitioner's admission to the Corps of Cadets pending respondents' appeal of the district court's liability determination. Pet. App. 102a-103a. On April 13, 1995, the court of appeals affirmed as to liability, *id.* at 1a-32a, but modified the district court's remedial order, *id.* at 18a. The court applied the remedial standards it had announced in *VMI I* and *VMI II*.[3] Although the

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[2] As used in this brief, the term "respondents" refers to the respondents other than the United States (a respondent under this Court's Rule 12.4).

[3] In *VMI I*, the court of appeals held that, to remedy its constitutional violation, the Commonwealth of Virginia

> might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

976 F.2d at 900. Virginia elected to create the Virginia Institute for Leadership (VWIL), a separate program exclusively for women at Mary Baldwin College, a private, women's liberal arts college in Staunton, Virginia. The district court approved the VWIL program, and the court of appeals in *VMI II* affirmed, holding that, notwithstanding that VWIL " 'differs substantially' from the educational program offered at VMI," it is "substantively comparable" to VMI and therefore constitutionally adequate. *United States* v. *Commonwealth of Virginia*, 44 F.3d 1229, 1235, 1237 (4th Cir. 1995) (*VMI II*), quoting *United States* v. *Commonwealth of Virginia*, 852 F.

court noted that South Carolina had already had substantial time to devise a remedy and had failed to do so, it held that the district court should give the State "reasonable" additional time beyond the start of the 1995-1996 school year to put its remedial plan in place. *Id.* at 14a-15a. The court emphasized that the State should have the opportunity in the first instance to devise a remedial plan to bring its higher education system into compliance with the Equal Protection Clause, and identified some of the remedial alternatives it viewed as acceptable:

> If [South Carolina] elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable. *See VMI II.* Alternatively, the state may adopt a coeducational policy for The Citadel, or it may withdraw state support from The Citadel and permit that institution to continue as a private institution.

Id. at 14a. The court of appeals also modified the district court's order requiring that The Citadel immediately admit petitioner to the Corps, instead ordering her admission only "if the state is unable to accomplish an acceptable alternative plan by August 1995." *Id.* at 18a.

4. On June 5, 1995, respondents filed a remedial plan in district court in which they proposed the creation of a "parallel" program exclusively for women to be called the South Carolina Institute of Leadership for Women (SCIL) at Converse College,

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Supp. 471, 473 (W.D. Va. 1994). The petition of the United States for a writ of certiorari in *VMI* is pending. *United States* v. *Commonwealth of Virginia*, No. 94-1941 (filed May 26, 1995).

a private, women's college in Spartanburg, South Carolina. *Faulkner* v. *Jones*, No. 2:93-488-2 (D.S.C. July 24, 1995), slip op. 3. The plan proposes to follow an approach similar to that reflected in the Mary Baldwin College plan Virginia approved in *VMI II*. Petitioner and the United States sought discovery regarding the Converse College plan.

5. Meanwhile, on July 12, 1995, petitioner filed the current petition for a writ of certiorari, seeking review of the court of appeals' judgment allowing respondents to exclude her from The Citadel if they devised a "substantively comparable" females-only alternative.

6. Remedial proceedings continued in the district court. On July 24, 1995, the district court held a hearing at which it found that respondents had deliberately withheld discovery information, had failed to respond properly to discovery requests in violation of the court's rules, and had otherwise slowed the discovery process. *Faulkner* v. *Jones*, *supra*. The court concluded that respondents' conduct made timely consideration of their remedial plan impossible, and that admission of petitioner to the Corps was the only effective remedial alternative for her. The court set an October 15, 1995, discovery cutoff and a November 6, 1995, trial date. Slip op. 12.

7. Respondents unsuccessfully applied to the court of appeals, and then to this Court, for a stay of petitioner's admission to the Corps of Cadets pending their filing of a petition for a writ of certiorari seeking review of the court of appeals' April 13, 1995, decision. On August 11, 1995, respondents filed such a petition. *Jones* v. *Faulkner*, No. 95-258.

8. Petitioner joined The Citadel Corps of Cadets when The Citadel's 1995-1996 school year began on

August 12, 1995. On August 18, 1995, however, petitioner withdrew from the Corps of Cadets. By motion dated August 31, 1995, Nancy Mellette, a high school senior and resident of South Carolina who wishes to attend The Citadel, moved to intervene as a plaintiff in this action and to renew petitioner's motion for class certification.

DISCUSSION

The court of appeals held that respondents constitutionally could adopt one of several remedial alternatives, and petitioner seeks review of the option that respondents have elected to pursue: The establishment of a separate, single-sex women's program "parallel" to The Citadel. The United States agrees with petitioner that the equal protection violation in this case cannot adequately be remedied by the creation of a college program exclusively for women. As we have argued in our petition for a writ of certiorari in *United States* v. *Commonwealth of Virginia*, No. 94-1941 (*VMI*), such a remedial alternative in the circumstances of these two cases is inconsistent with established equal protection principles and presents an issue of importance calling for this Court's review.

Respondents' proposed parallel program for women at Converse College has not, however, been reviewed or approved by the district court or the court of appeals. On July 24, 1995, the district court set an October 15, 1995, cut-off date for discovery regarding the Converse College remedial proposal, and ordered that a trial on remedy begin on November 6, 1995. The district court has not yet had an opportunity to make factual findings regarding respondents' proposed separate program for women. And it is

uncertain whether the district court or the court of appeals will find that separate program to be constitutionally adequate even under the lenient standard the court of appeals announced in *VMI II*. If the remedy chosen by respondents does not pass muster, respondents will have to adopt an alternative remedy, such as relinquishment of government funding or adoption of a sex-neutral admissions policy at The Citadel.

Review by this Court of the constitutional adequacy of the Converse College remedy thus would appear to be premature at this time.[4] This Court will, in all events, have an opportunity to review and decide the central issues in this case before the next school year begins, because the same issues are presented in the United States' pending petition for a writ of certiorari in *VMI*, No. 94-1941.[5]

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[4] In addition, petitioner's withdrawal from The Citadel renders her individual claim moot. Although another female candidate for The Citadel seeks to intervene as a plaintiff, the prematurity of the petition, for the reasons stated above, would be unaffected by such intervention.

[5] Petitioner asserts (Pet. 25-26) that there are material differences in the records in the two cases. The *VMI* record, however, presents no impediment to this Court's review of the question presented by petitioner in this case. Petitioner asserts (Pet. 25) that, "where the trial court in [*VMI I*] found that the admission of women to VMI would destroy its military program, * * * there was no such finding in the Citadel case." The admission of women would, however, have no greater impact on VMI than on The Citadel. Women's admission would not destroy either school; the court of appeals expressly held in *VMI*, as in this case, that admission of women was a feasible remedial alternative. *VMI I*, 976 F.2d at 900; see 94-1941 Pet. at 28-29 and 94-1941 Reply Br. at 6-8. Petitioner also suggests (Pet. 25) that respondents' concession that some women are qualified

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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to attend The Citadel distinguishes this case from *VMI*. Contrary to that suggestion, however, the lower courts in *VMI* found that some women could fulfill all of VMI's requirements. *VMI I*, 976 F.2d at 896; see 94-1941 Pet. at 4 and 94-1941 Reply Br. at 4. With regard to "the issue of whether single-sex education has pedagogical value" (Pet. 25), the records in the two cases are the same as well because the district court in this case provisionally accepted the findings in *VMI* on that issue. Pet. App. 36a & n.5. Petitioner further asserts (Pet. 25-26) that the cases differ in that South Carolina has a statute ensuring equal access and educational opportunities for all citizens. However, Virginia, too, has an official policy of providing higher education "without regard to sex, race, or ethnic origin." *VMI I*, 976 F.2d at 899.